HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 335/06 (M/S)
Sitapur Eye Hospital Garhwal.
Vs.
Civil Judge Srinagar and others.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision

4.4.2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 335 (MS) OF 2006

Sitapur Eye Hospital Trust Sitapur,
Situated at Srinagar Garhwal,
Through its Secretary, Dr. M.K. Mehra .....Petitioner.

Versus

1. Civil Judge (Junior Division), Srinagar,
   District Pauri Garhwal.
2. Kamleshwar Mandir Trust, through
   Mahant Ashutosh Puri (Chela/Shisya) Govind Puri,
   Kamlesh Mandir Srinagar Garhwal.
   District Pauri Garhwal.
3. Krishna Nand Methani, S/o Sri Bhaskara Nand Methani,
   Chairman Nagar Palika Srinagar,
   District Pauri Garhwal.
4. Mohan Lal Jain, S/o late Sri Babu Lal,
   Ex Chairman Nagar Palika, Srinagar Garhwal,
   District Pauri Garhwal. .....Respondents.

Mr. K.N. Joshi, Advocate for the petitioner.
Learned Standing Counsel for the respondent no.1.

Dated: 04.04.2006

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 28.03.2006 (filed as Annexure-11) passed by the respondent no. 1 prasad in Suit No. 7 of 2006. Further prayer has been made for a writ of mandamus directing the respondents not to interfere in the peaceful possession of the petitioner over the land in dispute.

2. Briefly stated, the petitioner has purchased a land by virtue of the sale deed dated 24th September, 1973 and since then he is continuously in the possession of the same by virtue of the registered sale deed executed by late Sri Mahant Govind Puri.

3. The petitioner has moved a mutation application before the Tehsildar under Section 34 of the Land Revenue Act, 1901 in Khata No. 21 Khet No. 1316 area 74 Nali 7 Muthi and Tehsildar Srinagar Garhwal/ Assistant Collector II passed an order for mutation in favour of the petitioner on 08.08.2001. By virtue of the same, the Tehsildar has directed for recording the name of the petitioner and the order has become final and the same was not challenged either in the appeal before the Collector or by way of any other proceeding.

4. The petitioner was recorded as a Bhumidhar of the land of 74 Nali 7 Mutthi on 20.09.2001 as will appear from the revenue records.

5. The grievance of the petitioner is that the trust of the petitioner has taken a decision to sell out the property and as such taking the benefit of the said resolution, a suit was filed by Mahant Ashutosh Puri before the Civil Judge (Junior Division), Pauri Garhwal for cancellation of the sale deed dated 24.09.1973 and the said suit was registered as Original Suit No. 7 of 2006. Along with the suit the plaintiff has also filed an application under Order 39 Rule 1, 2 and 151 C.P.C., to which the petitioner has filed an objection.

6. In the meantime, an application has been filed under Order 1 Rule 8 of C.P.C. by the respondent no. 2 before the Civil Judge (Junior Division), Pauri Garhwal and the same has also been objected by the petitioner. Learned Civil Judge has allowed the said application and made a rider that the petitioner shall not sell the property.

7. It appears that the learned Civil Judge while disposing of the application under Order 1 Rule 8 of the Code of Civil Procedure has also passed the order making the rider that the petitioner shall not sell out the property. In the garb of the application under Order 1 rule 8 C.P.C. the injunction order has been passed. Order 39 Rule 1 provides as under:-

"1. Cases in which temporary injunction may be granted. – Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wsted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) *that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,*

(c) *that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]*

the court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders."

8. Before exercising the powers under Section 39 Rule 1 C.P.C. the learned Civil Judge was required to make the compliance of the Order 39 Rule 3 C.P.C. and only after the compliance of Order 39 Rule 3, the injunction order could have been passed if the Civil Judge was prima facie satisfied

regarding the prima facie case, balance of convenience and irreparable injury.

9. Learned Civil Judge has neither recorded about the prima facie case, balance of convenience and irreparable injury, which are three principles before granting the injunction and as such the injunction order passed by the Civil Judge is in the teeth of the provisions of Order 39 Rule 1 read with Rule 3 of the Code of Civil Procedure.

10. As will appear from the Suit No. 7 of 2006 (Annexure No. 6) that the relief has been claimed for setting aside the sale deed of 24th September, 1973 and in paragraph 21, the ground has been given that without impleading the respondents, the sale deed has been executed. All these questions require adjudication by the learned Civil Judge.

11. In the present case, since the injunction order has been passed on the garb of the application under Order 1 Rule 8 of C.P.C., therefore, the learned Civil Judge is directed to pass orders on the application under Order 39 Rule 1 C.P.C. independently after application of mind.

However, the order, therefore, so far as the injunction matter is concerned, the same cannot be legally granted while deciding the application under Order 1 Rule 8 C.P.C. The grant of injunction, therefore, is quashed. However, it will be open for the petitioner to challenge the order under Order 1 rule 8 C.P.C. when it is passed finally after 26th April, 2006 before the appropriate Court. So far as the injunction matter is concerned, the order is quashed to that extent.

12. Writ petition is partly allowed. No order as to costs.

(Rajesh Tandon, J.)

04.04.2006
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